In the United States Circuit Court of Appeals for the Ninth Circuit

ERI THOMPSON and
J. M. CUMMINGS,
Appellants,
v.
J. L. REED,
Appellee.

No. 2162.

Appeal from the United States District Court for the Territory of Alaska, Third Division.

BRIEF OF APPELLEE.

J. L. REED and
E. E. RITCHIE,
Attorneys for Appellee.

PROSPECTOR PRINT, VALDEZ, ALASKA

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Statement of the Case.

For convenience the parties will be designated as in the court below, appellants as defendants, appellee and his assignor as plaintiff. The record shows that plaintiff in the trial court, before judgment in this suit, assigned his interest in the cause of action to appellee. (R. 116.)

The statement of the case by counsel for defendants is accurate enough, but appears to plaintiff's counsel to be unnecessarily exhaustive. It is respectfully submitted that the following statement embraces all the vital facts involved:

Plaintiff in this suit had recovered judgment in an action at law against defendant Thompson for money earned by labor on a mining claim in which Thompson was interested, and had caused two executions to issue on said judgment, which had been returned unsatisfied. Prior to recovery of said judgment but long after the action was instituted Thompson gave a deed to defendant Cummings, whereby he purported to convey and transfer for the stated consideration of one dollar certain real and personal property which is admitted to have been all the real and personal property he then owned in Alaska.

Judgment was entered in the action against Thompson April 25, 1910, in the district court of Alaska, for $1,621.25 including costs. A transcript of the judgment was sent to the recorder of Cook Inlet precinct to be filed and recorded in order to make it a lien upon any real property Thompson might own in said precinct, as provided by statute. This was filed by the recorder Sunday, May 22, 1910, at 11:10 p. m.. The deed from Thompson to Cummings was filed the same day at 8:30 p. m. (See deposition of the recorder, H. S. Farris, R. 37.)

After return of the alias execution indorsed *nulla bona* plaintiff brought this creditor's suit to subject all of the property described in said deed from Thompson to Cummings to the lien of plaintiff's judgment against Thompson. In his amended complaint plaintiff set up his judgment and the return of executions wholly unsatisfied, alleged that the deed from Thompson to Cummings was without consideration and was made for the purpose of hindering, delaying and defrauding plaintiff in the collection of his judgment aforesaid. Defendants answered separately, denying that the deed in question was made for the purpose of hindering, delaying and defrauding plaintiff in the collection of his judgment, and alleging the good faith of the transaction. The trial court found that the deed was fraudulent, and decreed that the real estate was subject to the lien by virtue of his judgment upon the personal property described in the deed because it had never been seized under process.

From the finding and decree against the validity of the deed defendants appeal.

Assignment of Errors.

Counsel for defendants present sixteen assignments of error in the proceedings of the trial court. In their brief, however, they base their argument upon an array of "points" with little attention to the assignments of error. Plaintiffs therefore, to conform their argument in logical sequence to that of defendants, will follow the "points" in order rather than the assignments of error.

Argument.

Point 1. "The amended complaint shows on its face that the plaintiff had not exhausted his remedy at law before bringing this suit for equitable relief." This contention is raised by the first, second and fifth assignments of error.

In support of this contention counsel cite the allegations in the amended complaint that Thompson, the judgment debtor, was still in possession of personal property which his deed to Cummings purported to transfer, that he was still the owner of it and had executed a chattel mortgage upon it to one Murphy, which mortgage was averred to be fraudulent. Counsel then argue "that so long as a judgment debtor has property open to execution his judgment creditor cannot go into equity to satisfy his judgment out of assets that as between the debtor and third parties belong to the latter."

This contention is disposed of by either of two answers:

First. The contention and counsel's argument are based upon the erroneous assumption that the amended complaint shows on its face that certain personal property was sold by Thompson to Cummings and then transferred back by Cummings to Thompson. The amended complaint contains no reference to a transfer back. It does allege two acts of Thompson concerning this property designed to hinder, delay and defraud plaintiff,—a fictititious sale and a sham mortgage. Both are alleged to be fraudulent and void as to plaintiff. Plaintiff nowhere admits either to be genuine. It is difficult to see how counsel deduce from the amended complaint the assumption that it shows on its face a reconveyance of the personal property, or any of it.

Second. Plaintiff submits that it is not an accurate statement of the law to say that a judgment creditor must "exhaust" legal remedies. A party is always entitled to go into equity in a case of equitable jurisdiction when he has no plain, speedy and adequate remedy at law. The latter phrase is invariably found in complaints asking for an injunction.

A judgment creditor can scarcely be held to have an available remedy at law when the only property claimed to belong to the debtor has been nominally transferred to a third party, and some of it mortgaged. In such case an action of some kind is necessary to subject the property to application on the judgment. It is not "open to execution" while the title is clouded by purported transfers and mortgages, even though fraudulent.

How have counsel pointed out that the judgment debtor in this case had property open to execution? They point to the stock of liquors and other chattels which made up the stock of the saloon business at Susitna in which Thompson had an intermittent interest according to his own statements and a constant interest according to plaintiff's contention and popular belief. The place was known all the time as the saloon of Thompson & Price, (Deposition of H. S. Farris, R. 36) and the liquor license was continued all the time in the name of Thompson & Price, (R. 33.) This property plaintiff alleged in his amended complaint was the property of Thompson until after this creditor's suit was brought, and purported to be under mortgage to Murphy.

Now what could plaintiff have done with this saloon property under execution levy? Counsel for defense explain: He could have recogniezd the mortgage and tendered the amount of it—$1,100—to the mortgagee and proceeded to sell the property on execution. Counsel admit that this would have been a "burdensome condition" but aver that it was still a legal remedy, and therefore should have been exhausted before recourse to equity was sought.

Does the law require an execution creditor to assume such burdens? In this case the stock was worth, according to the testimony of defendant Cummings, "twenty-five or twenty-six hundred dollars" with an indebtedness against it of "seventeen or eighteen hundred dollars." (R. 52-53.) So this is what plaintiff and the officer with the execution had to face. Thomp-

son's half interest was worth more than $1,300. It was covered with a purported mortgage for $1,100.

Counsel for defendants in their yearning to exhaust legal remedies offer plaintiff this pleasing requirement; that he pay Murphy $1,100 in cash and then sell the undivided one-half interest in this frontier saloon stock, valued for purposes of retail sale and wholesale barter at $1,300, for so much as it would bring at execution sale, and out of the proceeds pay the costs of the sale, recover the $1,100 paid to the mortgagee, and apply the surplus on his execution.

This was the legal remedy which counsel for defendants insist barred plaintiff's way to the court of equity until it was "exhausted."

Counsel also seriously observe that plaintiff alleges Murphy's mortgage to have been fraudulent. In that case, counsel assure the court, all plaintiff had to do was to levy on the stock and sell it as if no Murphy mortgage had ever been heard of. Counsel fail to advise us what view they would take of this "remedy" if in such case Murphy had seen fit to retake possession of the stock by writ of replevin. It is true that even then plaintiff would not have been remediless in the premises. He could have given a re-delivery bond in double the value of the property, re-taken possession and proceeded with it as he saw fit.

In recommending these "remedies" at law to plaintiff counsel for defendants overlook an additional burden. After getting rid of the questionable chattel mortgage by any means possible there remained an unsecured indebtedness on account of the saloon stock, against the

partnership owning it, an indebtedness of about three-fourths of its value. Now it is settled law that partnership debts must be paid out of partnership property before any of the partnership property can be taken for an individual debt of one of the partners. Plaintiff would have had to pay the partnership debts out of the property before he could have taken Thompson's half of the remnant on execution.

Does equity impose such hard conditions on a judgment creditor? Of what value is a money judgment for labor to a poor man if the debtor who, according to the judgment of a court is wthholding from him the wages of his toil, can by legal technicalities keep him out of the court of equity which could subject the debtor's property to payment of the judgment?

If the position of defendants' counsel is correct a judgment debtor owning a fortune in realty and a small amount of personalty might defeat collection of a judgment through equity, by making fraudulent conveyance of the realty and placing a chattel mortgage on the personal property for approximately its value. If he does that the creditor cannot proceed against the real property until he has paid the chattel mortgage and levied on and sold the personal property, even though he lose money by the transaction.

The statute requires that levy of an execution be made first on personal property of the debtor if any can be found subject to levy. This was the common law rule, based upon the theory that the debtor can better afford to lose his personal than his real property. But when the debtor himself asserts that he owns no chattels sub-

State of Washington,
County of King—ss.

THOMAS CHRISTIANSON, being first duly sworn, on oath deposes and says, that he is the plaintiff in the above entitled action; that he has heard read the foregoing complaint, and knows the contents thereof, and believes the same to be true.

THOMAS CHRISTIANSON.

SUBSCRIBED and sworn to before me this 24th day of April, 1911.

(Seal) ANNA RASDALE,
Notary Public in and for the State of Washington, residing at Seattle.

Indorsed: Complaint. Filed in the U. S. Circuit Court, Western District of Washington, Apr. 24, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

In the United States Circuit Court of the Western District of Washington. Northern Division.

THOMAS CHRISTIANSON, *Plaintiff.*
vs.
THE COUNTY OF KING, *Defendant.*
No. 1969.

AMENDED DEMURRER.

Comes now the defendant by protestation and not confessing or acknowledging any or all of the matters or things contained or alleged in plaintiff's complaint herein to be true, and reserving herewith the right of defendant to answer to each and all of the allegations so made by plaintiff in said complaint and to file the several defenses of this defendant thereto, the defendant herewith demurs to said complaint, and for a cause of demurrer to same shows:

1. That the plaintiff has no legal capacity to maintain this action.

2. That the said complaint does not state facts sufficient to constitute a cause of action against the defendant.

3. That said action has not been commenced within the time limited by law therefor.

4. That said complaint shows upon its face that the plaintiff has been guilty of laches and of procrastination in the bringing of said action.

5. That the Court has no jurisdiction over the person of defendant, or over the subject matter of said action.

6. That plaintiff's complaint shows that plaintiff by his own acts, deeds and omissions is now estopped from bringing and maintaining this action or from asserting any right, title or interest in and to the property described in said complaint.

JOHN F. MURPHY, and
ROBERT H. EVANS,
Solicitors for Defendant.

United States of America,
Western District of Washington—ss.

ROBERT H. EVANS, being first duly sworn, on oath deposes and says that he is one of the solicitors for the defendant above named; that he has read the foregoing demurrer, knows the contents of same, and believes that said demurrer to said complaint is well taken and is well founded in law, and herewith certifies upon his honor and belief that said demurrer to said complaint is well founded as aforesaid.

ROBERT H. EVANS.

Subscribed and sworn to before me this 17th day of May, 1911.

LOUIE T. SILVAIN,
Notary Public in and for the State of Washington, residing at Seattle.

United States of America,
Western District of Washington—ss.

DAVID McKENZIE, being first duly sworn, on oath deposes and says that he is Chairman of the Board of County

"There are two classes of cases where a creditor is permitted to come into equity for relief after he has obtained a judgment at law: The one class where his judgment or execution has given him a lien, but he is compelled to come into equity to have removed some obstruction or conveyance fraudulently or inequitably interposed which prevents or embarrasses a sale under execution; the other class where he comes into equity to obtain satisfaction of his debt out of property of the debtor which cannot be reached at law. In the latter case, as already shown, the relief depends on the creditor having exhausted his remedies at law by having execution issued and returned unsatisfied. In the former the creditor can come into equity to have the fraudulent obstruction removed as soon as he obtains a lien by judgment or execution, and is not obliged to show that he has exhausted his legal remedy of execution."

"It is sufficient, in a complaint in a suit by a judgment creditor to reach property alleged to have been conveyed in fraud of his rights, to state that an execution had been issued upon his judgment, and duly returned unsatisfied, without alleging the debtor's insolvency, or that he had no other property out of which the judgment could be made." Page v. Grant, 9 Ore. 116.

"When a judgment creditor has issued an execution and the sheriff has returned it unsatisfied, he has exhausted his legal remedy." Id.

A creditor's bill that alleges the issuance of an execution and its return *nulla bona* need not allege that the judgment debtor had no property out of which the

judgment can be satisfied. Wyatt v. Wyatt, 31 Ore. 531; 49 Pac. 855.

The sheriff's return of the execution unsatisfied is the best evidence of such failure of the remedy at law and cannot be controverted. Jones v. Green, 1 Wall. 330; McElwain v. Willis, 9 Wend. 559.

Other authorities to the same effect are Multnomah St. Ry. Co. v. Harris, 13 Ore. 198; Reed v. Loney, 61 Pac. 41 (Wash.); Schofield v. Ute Coal & Coke Co., 92 Fed. 269.

Brushing away technical quibbles the rule requiring the exhaustion of legal remedies before resorting to equity is this: If the debtor has tangible property, unincumbered, with title unquestioned, which is subject to seiure on execution the creditor must exhaust that property, personalty first, then realty, before resorting to equity. But he is not required to lift mortgage liens or contest the validity of fraudulent transfers and mortgages in his pursuit of legal remedies. The latter is an equitable suit in any case, so why not simplify the controversy by a single suit designed by long settled procedure for that purpose?

It is difficult to argue seriously the suggestion of defendants' counsel that a judgment creditor has not exhausted his legal remedies if he has failed to pay off a mortgage on personal property in possession of the debtor and admitted to belong to him, and levy an execution thereon. If the mortgage is stated to be $1,100 or more and the creditor owns about $11, how is he to pay the mortgage and proceed to the exhaustion of his legal remedy? He is certainly in a case to appre-

ciate the force of counsel's sympathetic admission that the condition is burdensome.

In this connection let it not be overlooked that while both defendants testify that Cummings sold back to Thompson the saloon stock and business within a short time after the deed was made and several months before it was recorded, no bill of sale indicating the transfer back was ever made or recorded and the evidence of Thompson's title rested on his possession and his mortgage to Murphy.

Second Point. "The court erred in laying upon the defendants the burden of affirmatively proving their good faith and an adequate consideration between them, by holding that the deed was fraudulent by statute as to the personalty embraced, and that it was therefore presumptively fraudulent in toto."

Plaintiff respectfully submits that the trial court did not "hold" as stated. What the court held was that the deed was constructively fraudulent as to the personalty it sought to transfer, under section 1043 of the Alaska statute, and that this fact in connection with the additional and weighty fact that the transaction in the course of its history embraced every badge of fraud known to the catalogue of such badges in the accepted law of fraudulent conveyances created a prima facie case in favor of plaintiff which shifted the burden to the defense. Here is what the trial judge said in his decision:

"While under section 1043, supra, the fraud presumed from want of change in possession is confined to personal property, yet in this case where both real and

personal property was transferred by one instrument, which property constituted the entire estate of the debtor and there was no actual change of possession of any of the property until long subsequent, this taken in connection with the various circumstances above pointed out is sufficient to shift the burden of evidence as to the bona fides of the sale from the plaintiff to the defendants. Many other circumstances may be mentioned of the class ordinarily denominated as of fraud." (R. 129.)

The decision then proceeds to enumerate fourteen of these badges of fraud.

In spite of the manifest attempt on the part of counsel to limit and qualfy the ruling of the court in holding that the plaintiff had established a prima facie case that the deed was made to hinder, delay and defraud plaintiff in the collection of his judgment, to the single fact that there had been no actual change of possession of any of the property conveyed, we submit that there were many other facts and circumstances before the court, some admitted by the pleadings and others offered in evidence, to which the court refers in its decision as "this taken in connection with the *various circumstances above pointed out,*" which justified the court and sustained his ruling in holding that the burden of proof had shifted to the defendants.

Facts Admitted by the Pleadings.

The pleadings admit that on the 25th day of April, 1910, plaintiff recovered a judgment against Eri Thompson and Dave Wallace, jointly and severally, in

the sum of $1,598.60 and costs. That on the first day of July, 1910, an execution was issued on said judgment which was returned unsatisfied. That on the 2nd day of September, 1910, an alias execution was issued and returned "that no property of said Eri Thompson could be found in the said Third division subject to execution and levy."

That Dave Wallace departed from the Territory of Alaska on or about the month of October, 1907, for the purpose of defrauding and defeating plaintiff in the collection of this judgment. That he has no property, real or personal, in the Territory of Alaska, out of which plaintiff could satisfy this judgment, and that the said Dave Wallace is insolvent.

The answer of defendant Eri Thompson admits that the mortgage and deed transferred *all* of the property, real and personal, of defendant Eri Thompson in the Territory of Alaska or elsewhere known to plaintiff and out of which he could satisfy his judgment herein, and that the said Eri Thompson *is insolvent.*

DOCUMENTARY EVIDENCE OFFERED BY PLAINTIFF.

1. Findings of Fact and Conclusions of Law in action No. 233 Thomas H. Meredith v. Dave Wallace and Eri Thompson, co-partners as Wallace and Thompson. (R. p. 106.)

2. Judgment in action No. 233. Dated April 25, 1910. Amount $1,598.60. Costs $32.65. Against Dave Wallace and Eri Thompson, co-partners, jointly and severally.

3. Execution issued July 1st, 1910, returned unsatisfied. Alias execution issued September 2nd, 1910, returned *"nulla bona."*

4. Quit claim deed. Dated 25th day of October, 1909, Eri Thompson, grantor, J. M. Cummings, grantee. Consideration, *One dollar.* Property conveyed, (R. p. 98.) Indorsed *"Filed May 22, 1910, at 8:30 p. m. request of Eri Thompson."*

5. Transcript of plaintiff's judgment. Indorsed "The within instrument was filed for record at *11:10 o'clock p. m. May 22, 1910,* and duly recorded on book III, Orders and Judgments, on page 1 of the records of said district." (R. p. 100, 101.)

6. License. It is admitted in evidence (R. p. 33) that barroom license No. 5771 was issued to Thompson and Frye for the year commencing May 20, 1909, and that the same was never transferred nor any application made for an order substituting Cummings for Thompson.

7. Chattel mortgage dated 14th day of July, 1910. Eri Thompson to W. Murphy. An undivided one-half interest in and to that certain stock of liquors and cigars now owned by Eri Thompson and Hugh Price, either in the saloon conducted by said Thompson and Price or in transit from Seattle or other cities to Susitna. Mortgaged as security for the payment of the sum of $1,100. No interest. No witnesses.

Depositions read on behalf of plaintiff. Deposition

of H. S. Farris. (R. p. 34, 35, 36 and 37.) Deposition of Hugh Price. (R. p. 38, 39 and 40.)

BURDEN OF PROOF. "As has already been noticed, presumptions arise that a conveyance is fraudulent on a showing of certain facts, such as that a conveyance by one indebted is voluntary, etc. These presumptions are, however, rebuttable presumptions, and their only effect is to *shift the burden of evidence* to the party against whom the presumption exists." 20 Cyc. 750.

"The burden of proof, where it is on the plaintiff, may be shifted to the defendant where plaintiff makes out a prima facie case of fraud." 20 Cyc. 759.

Fraud is never to be presumed when the transaction may be fairly reconciled with honesty, especially where it is alleged to have occurred many years before the bringing of suit, and hence the burden of proof, where not governed by statute, is on the attacking creditor to show fraud in the conveyance; but where facts appear which are sufficient to raise a presumption that the conveyance is in fraud of the *grantor's* creditors, the burden of showing good faith is shifted to the parties to such conveyance." 20 Cyc. 751.

CONSIDERATION. "The general rule is that a conveyance with a *consideration merely nominal* will be considered *voluntary* as against attacking creditors." 20 Cyc. 492. Thomson et al v. Crane et al 73 Fed. 327.

The Court said, "The deeds have been executed and delivered by the grantor to the grantees without any intent on his part to hinder, defraud or delay creditors of the grantor, it devolves upon the complainants to

show that they were creditors of the grantor at the time he executed the deeds. *A voluntary deed is fraudulent by operation of law,* where the facts and circumstances clearly show that existing creditors are thereby prejudiced, without regard to whether there was any actual or moral fraud in the conveyance."

SOLVENCY OF GRANTOR. "Although there are some decisions to the contrary, the general rule is that where a conveyance not purporting to be based upon a valuable consideration is attacked by a creditor, whose debt was in existence at the time of the transfer, the burden of proving that the transferrer retained sufficient means to pay existing creditors is on defendant. In other words the burden of proving solvency in such a case is on the party seeking to sustain the validity of the transfer. A fortiori if the complaint alleges a *conveyance of all the grantor's property* and the answer not only denies that fact, but also avers that after the delivery of the deed the grantor was seized of real estate, located in certain counties, abundantly sufficient to pay the claims of his creditors, the *burden of proof* rests on the defendant." 20 Cyc. 757.

"There are circumstances so frequently attending conveyances and transfers intended to hinder, delay and defraud creditors that they are denominated badges of fraud. These badges of fraud do not in themselves or *per se* constitute fraud, but are rather signs or indicia from which its existence may be properly *inferred* as matter of evidence. They are more or less strong or weak according to their own nature and the *number*

concurring in the case. They are as infinite in number and form as are the resources and versatility of human artifice." 20 Cyc. 440.

TRANSFER IN ANTICIPATION OF OR PENDING SUIT. "If a transfer is made by a debtor in anticipation of a suit against him, or after a suit has begun and while it is pending against him, this is a badge of fraud, but the pendency of a suit will not overturn a conveyance made in good faith and for value. If a conveyance is made pending suit against the grantor, for the purpose of preventing the collection of such a judgment as may be recovered, and with the *knowledge of the grantee* that is is so made, it will be set aside at the instance of the plaintiff in such suit after judgment for him therein. whether made with or without a valuable consideration." 20 Cyc. 444.

CONCEALMENT OF OR FAILURE TO RECORD CONVEYANCE. "The fact that a conveyance is withheld from record or is otherwise concealed is a badge of fraud. Failure to record a conveyance is, however, only a circumstance *to be considered in connection with other facts,* and is insufficient in and by itself to establish a fraudulent intent." 20 Cyc. 447.

SECRECY OR HASTE. "Secrecy is a badge of fraud; and so is undue or unusual haste a badge of fraud. Secrecy is a circumstance which may give force to other evidence and from which in connection with other facts fraud may be inferred." 20 Cyc. 448.

Insolvency or Indebtedness of Debtor. "Evidence of large indebtedness, or of complete insolvency, is an important element in marshaling badges of fraud to overturn fraudulent transfers, but mere indebtedness of the grantor at the time of making a conveyance is not generally of itself such evidence of fraud as will avoid a conveyance, although it is voluntary." 20 Cyc. 449.

Transfer of all the Debtor's Property. "The transfer of all or nearly all of his property by a debtor, *especially when he is insolvent* or greatly embarrassed financially, is a badge of fraud." 20 Cyc. 449.

Retention of Possession. The unexplained possession or retention by the grantor of the property transferred is a badge of fraud. 20 Cyc. 450.

Other Circumstances. "The fact that the transaction took place out of business hours or otherwise not in the usual course of business or not in the usual mode, the failure of the purchaser of goods to examine them etc. The fact that the *grantor* in the conveyance delivers the same to the recorder for the purpose of having such deed recorded, or that the grantor keeps his other property inaccessible to his creditors has each been held a circumstance indicating fraud." 20 Cyc. 451.

Repelling Badges of Fraud. "Where numerous signs or badges of fraud exist it is incumbent on the party seeking to uphold the transfer to meet and overcome them." 20 Cyc. 543.

In Mendenhall v. Elwert 36 Or. 375, the Court

of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to changes of time and circumstances."

It was therefore entirely competent for the legislature to provide that the territory or one of its counties should be the ultimate heir of those dying intestate and without other heirs or kindred; and it was further competent for it to provide that the rights of the territory or the county should be determined by the Probate Court in the administration proceeding in the same manner and by the same procedure as the rights of any other claimant to the estate.

It is conceded that under section 340 of the Probate Act relating to the descent of real property, it would have been entirely competent for the Court to determine that there were no children or lineal descendants of the intestate under subdivision one, and to distribute the property to the father under subdivision two. It would likewise have been competent for that Court to determine that there was no father or lineal descendants under subdivisions one and two and to distribute it to the brothers and sisters under subdivision three. Its determination upon these questions after due notice and hearing, on well established principles, would be binding upon the whole world.

McGee v. Big Bend Land Co., 51 Wash. 406.
In re Ostlund's Estate, 57 Wash. 359.
Case of Broderick's Will, 21 Wall. 503.
Proctor v. Dicklow, 45 Pac. 86.

Why was it not equally competent for the Probate Court to determine that there were no kindred and to escheat the property to the county? In my opinion such was the legislative intent, and this view of the subject is strengthened by reference to subdivision seven of section 353, relating to the

distribution of personal property. It is there provided that if there be no husband, widow or kindred of the intestate, the personal estate shall escheat to the county and the administrator shall convey it to the county treasurer. The provision is not that the administrator shall convey it to the county treasurer, if not claimed by husband, widow or kindred, but that he shall convey it if there are none such, and the Probate Court was necessarily invested with jurisdiction to determine that question. This view is further strengthened by the fact that the provision of section 480 of the Civil Practice Act of 1854 (Laws '54, p. 218), authorizing the prosecuting attorney to file an information in the District Court for the recovery of property escheated or forfeited to the territory, was eliminated by the Civil Practice Act of 1863 (Laws '63, p. 192), and since 1863 there was no provision in the laws of either the territory or state, in relation to escheats, except those found in the Probate Practice Act, until the passage of the Act of 1907.

1 Rem. & Ball. Code, Sec. 1356, *et. seq.*

The latter act left the subject of escheats to be dealt with by the Court administering the estate as before, limiting only the time within which heirs must appear to claim the estate. The Probate Courts of the territory and the Superior Courts of the state have uniformly assumed jurisdiction in this class of cases, and the right of the state or county to appear in the probate proceeding and contest the rights of other claimants has been recognized by the highest court of the state.

In re Sullivan's Estate, 48 Wash. 631.

For these reasons I am of opinion that a valid title was vested in the county by the decree of the Probate Court and that the complaint states no cause of action. This view of the case renders it unnecessary to consider the question of adverse possession. If the complaint contains a defense on that ground it will at once be conceded that the pleading is very inartificially drawn with that object in view, but nevertheless it is difficult to escape the conclusion that the county has held the property adversely under color of title and claim of right far beyond the statutory period.

I have not overlooked the fact that the complaint avers that

amounts to notice, and is equivalent in contemplation of law, to actual knowledge, and makes the grantee a party to the wrong." Clements v. Moore, 6 Wall. 312.

Under the rule declared in Causler v. Cobb 77 N. C. 30 and approved by the Supreme Court of the state of Oregon in Weber v. Rothschild, 15 Or. 385, it was necessary for plaintiff to establish a prima facie case by showing that the deed in question had been executed to defraud plaintiff, a creditor of defendant, and upon such a showing the burden of proof shifted to the grantee (Cummings) to protect his title by showing affirmatively a valuable consideration and without notice of the fraudulent intent of the grantor.

In support of the point that plaintiff had established such a prima facie case the following facts were before the Court at the conclusion of plaintiff's evidence. That the deed of October 25, 1909, Eri Thompson, grantor, to J. M. Cummings, grantee, conveyed *all* the grantor's property, both real and personal. That the property conveyed was of a miscellaneous character, to-wit: A placer mining claim; a one-half interest in a saloon building and lot; a one-half interest in saloon fixtures, cigar and liquor licenses; a log-house (used as a road house) with fixtures and chattels; and a log cabin with chattels. The deed was executed pending suit against the grantor Eri Thompson for work and labor performed upon the same mining claim conveyed (Battle Axe claim) and judgment rendered April 25, 1910, against Dave Wallace and Eri Thompson, co-partners, jointly and severally in the sum of $1,598.80 and costs. (R. p.

91.) That two executions were issued on said judgment and both returned unsatisfied. (R. p. 92, 95.) That Dave Wallace departed the Territory of Alaska for the purpose of defrauding plaintiff in this action and is insolvent. That Eri Thompson is insolvent.

The consideration stated in the deed is one dollar. The law places a conveyance for a *nominal consideration* in the same class with *voluntary conveyances,* and proof of this fact is of itself sufficient, unsupported by any other circumstance indicating fraud, when attacked by a judgment creditor, to shift the burden of proof to defendants, and then the law requires of them to affirmatively show good faith and a valuable consideration.

The facts offered in evidence show that there was no actual change of possession of any of the property conveyed. It was admitted in evidence that barroom license No. 5771, issued to Thompson and Frye for the year commencing May 20, 1909, was never transferred to Cummings nor any application made for an order substituting Cummings for Thompson. (R. p. 33.) As to the conducting of the saloon business after October 25, 1909, Farris testified: "It was generally spoken of as Thompson & Price" (R. p. 36) and Price the former partner of Thompson testified in answer to the question "Did Cummings ever in person conduct the saloon business known as Thompson and Price at Susitna? If so, state when and for how long? Answer: No. (R. p. 37.) He further testified that he conducted the business without a change. (R. p 38.) That

he never had any accounting with Cummings (R. p. 39.)

Counsel assert that the actual possession of the personal property "automatically shifted" to Cummings after the execution of the deed. The sale of the license to sell intoxicating liquors did not automatically shift the license to Cummings, neither did the sale of a one-half interest in the saloon business automatically create him a partner with Price. Nor does the theory of "automatic shifting" of possession comply with the law.

WHAT CONSTITUTES CHANGE OF POSSESSION. "When property is susceptible of it, there must be an *actual, open and notorious change of possession, indicated by such outward and visible signs as give notice to all the world* that the title to all the property has passed to the vendee, and that the vendor's control over it has ceased." 20 Cyc. 541.

The grantor having by the same instrument conveyed all his property, both real and personal, upon proof of the fact that there had been no actual change of possession of the personalty as required under Section 1043 of the Alaska Code of Civil Procedure, "Every sale or assignment of personal property, unless accompanied by the immediate delivery and the actual and continued change of possession of the thing sold or assigned, shall be presumed *prima facie* to be fraud against the creditors of the vendor or assignor—during the time such property remains in the possession of said vendor." The presumption is created that it was the intent of the grantor Eri Thompson when he executed the deed, to hinder, delay and defraud the plaintiff as to

the personal property conveyed and the Court did not err in holding that a prima facie case of fraudulent intent had been established as to the conveyance as an entirety, especially in view of the fact that many other badges of fraud and suspicious circumstances were also in evidence.

The evidence shows that grantee failed to record deed for a period of almost seven months, from October 25, 1909, until May 22, 1910, and that then the deed was delivered by the *grantor, Eri Thompson,* to the recorder and at his request filed for record, after business hours, on Sunday at 8:30 o'clock of the night of May 22, 1910, two hours and forty minutes before the recorder filed for record plaintiff's transcript of judgment which had been sent to him by mail. (R. p. 100.)

Third Point. "The burden of proof of fraud, resting properly on the plaintiff, is not sustained by the evidence; and even if it be held, as by the court below, that the burden was on the defendants to prove good faith, that fact is fully established by the evidence."

Viewing the evidence as a whole, we submit that the number of badges of fraud and suspicious circumstances in connection with this case are far greater than those found in the famous Tyne case, decided in 1601, 1 Smith Lead. Cas. 1, from which most of our law relating to fraudulent conveyances is derived. As the number of badges of fraud increase the stronger becomes support of the conclusion that the sale was fraudulent. In attempting to prove facts entirely within their knowledge defendants failed to introduce *any documentary evidence* in support of a single transaction

at the time of and subsequent to the execution of the deed, although the testimony of Cummings describes many transactions of a kind in which documentary evidence is usually relied on by either one or both of the parties thereto.

As to the question of consideraton. The trial court saw J. M. Cummings on the witness stand and heard him testify and believed that his testimony as to consideration was false, and he likewise so concluded as to that of Eri Thompson. The question of consideration is necessarily vital when a conveyance is attacked as fraudulent. In the separate answer of J. M. Cummings he alleges "a valuable consideration of One Thousand Five Hundred Dollars *lawful money* of the United States of America." (R. p. 14.) The answer of Eri Thompson contains a similar allegation "for the sum of One Thousand Five Hundred Dollars *lawful money* of the United States of America, which sum was fully paid." (R. p. 18.) Cummings testified that *$500 was paid in currency* in Thompson's room in the hotel, that no other was present, and Thompson's note to him for $1,000, payable one year after date, without interest, was cancelled. That the note was past due more than a year. (R. p. 49 and 50.) Note not offered in evidence.

As to agreeing upon consideration and value of property Cummings testified "just taking Thompson's word about it and from information I had about the business over there." (R. p. 66.) Cummings says that he was at Susitna but once and that was in March, 1911, hence he had not seen any of the property conveyed. (R. p.

55.) Owing to the question of consideration being vital to the affirmative defense, the variance between the pleadings and the proof brings this case within the rule, "an incorrect statement of the consideration of a mortgage, deed of trust or other conveyance is a badge of fraud." 20 Cyc. 442. The difficult situation in which counsel for defendants find themselves in trying to give an appearance of plausibility and good faith to the testimony of their clients is forcibly illustrated by this argument near the bottom of page 23 of their brief:

"The plaintiff could readily have called witnesses and compelled the production of books from the bank at Seward, where the trial was had, in an effort to prove the falsity of Cummings's statement that on going to Valdez he had drawn money from the bank."

Plaintiff suggests that Cummings could "readily have compelled production of books from the bank." Cummings knew whether or not he had drawn the money as he stated under oath. The fact was peculiarly within his own knowledge. If he no longer had the cancelled check in his possession the bank records would have supported his sworn statement which he and his counsel preferred to leave unsupported in the record, when the bank could so "readily" have furnished conclusive corroboration. The production of this evidence was inferentially suggested by the court. The record, pp. 79-80, contains the following, the questions being put by the court.

Q. You say before you went over there (to Valdez from Seward) you drew $500 out of the bank here?

A. I drew out six or seven hundred, as I remember.

Q. Before you went over? A. Yes, sir.

Q. What bank were you banking with here?

A. The Bank of Seward.

Q. Will that show in your account with it.

A. I don't know.

It may be fairly inferred that this testimony and the failure of the defense to produce the books of the Bank of Seward did not strengthen the trial court's belief in the truth of Cummings's testimony.

It is worthy of attention that this alleged check for money drawn and the cancelled note for $1,000 had both been lost or destroyed.

Cummings testified that "I was taking a chance—most of my idea in buying an interest was to get into business" (R. p. 51 and 52.) He says that he left Valdez the latter part of November 1909 for Seward and remained there until April 5th, 1910, and went to Knik with George Palmer, and in answer to the question, "Did you engage in business with him there?" says, "I was working in the saloon for him, in the saloon, and my wife was running the roadhouse." Cummings says that he resold the one-half interest in the saloon business and licenses to Thompson in February, 1910, for $400 cash. (R. p. 54) and further testifies that when he sold back the liquor stock no papers passed between him and Thompson, that it was "just a verbal transaction." (R. p. 74.) Also, in answer to the question, "Were you ever in Susitna before you sold this property?" says, "Never had seen it, then; no, sir" It is dif-

ficult for even the imagination to give credence to the good faith of this transaction. It presents this anomaly, Cummings was selling a one-half interest in something that he had never seen, while Thompson had just returned to Seward, having been away from Alaska from November, 1909, to February, 1910. He could not have known what he was buying, because Price, who had been running the saloon in the interval, might have wrecked the business. In view of the fact that Susitna is 200 miles from Seward many things mght have happened without the knowledge of either the buyer or seller. Again, Cummings says there was no accounting made of the business during the winter. (R. p. 55.)

INADEQUACY OF CONSIDERATION. Wolf testified that about $4,000 was taken out of the mining cliam during 1907. (R. p. 81.) It is quite evident that Thompson knew this fact when he made the deed. Cummings says that he received in royalties, 25 per cent. of the yield. which was $465 in 1910 and $952.50 in 1911, (R. p. 60.) That he sold his interest in the saloon business for $400; that he sold the roadhouse for $800, $200 cash and balance in installments of $200 each six months; that he had secured rentals from his one-half interest in the saloon building amounting to $340.

Cummings says that he gave Joe Beedy, who is dead (R. 62), the deed together with the cost of recording and asked him to have it recorded. (R. p. 63.)' The recorder's indorsement on the deed shows that it was filed for record at the request of Eri Thompson.

From the relation of the parties to the property after it was conveyed can be gathered circumstances indi-

cative of the intent which controlled at the date of conveyance. Cummings never saw any of the property from October 25, 1909, to March, 1911, when he went to Susitna for the first time and remained theree but two or three days. He had never seen the mining claim at the date of the trial. (R. p. 53.) Al. Wolf testified that in February, 1910, he talked to Thompson at Seward as follows: "I spoke to him, trying to get a lay on the ground, as I didn't know for sure whether the Harper boys were coming, and he said he couldn't say a thing until the Harper boys came." When there was trouble between the Cache Creek Company and the lessee of the Battle Axe claim on Thunder creek during the summer of 1910, Thompson appeared on Thunder creek, having traveled one hundred miles, and Arthur Meloche testifies that he heard Thompson say that he had been over to see Morgan (the representative of the Cache Creek Company) "About this water affair." (R. p. 88.) Cummings says Thompson was never authorized to act as his agent at any time. (R. p. 62.)

It is plainly evident from Cummings's testimony that the details of the lease on the mining ground were arranged by some person other than himself, as he says, "Why, I signed the lay in Knik, the lease." Question. "And the arrangement was made there, was it, at Knik?" Answer. "No, I think it was made at the station (Susitna.) It was sent over to me to sign. I think that Harper had the papers made out over at the station and Harper sent them to me through the mail." The same is true with regard to the sale of the roadhouse.

He testifies, "I signed a contract and option to Mrs. Johnson."

Q. Where was that drawn up? A. At the station.

Q. By whom, do you know? A. I don't know.

Q. When was that sent to you?

A. I think in September.

These facts clearly indicate that Cummings did nothing more than carry out the bare formalities, while the other person (presumably Thompson) gave attention to the substance of the lease and contract of sale.

On Cummings's behalf it is urged that even though Thompson's intent was fraudulent he had no notice of such intent. He knew that suit was pending against Thompson (R. p. 66) and he knew that Thompson was conveying all his property. Further, Thompson and Cummings were represented throughout the trial of this case by the same attorney. If their defenses are incompatible this fact can only be reconciled upon the theory of fraud and collusion. These with many other facts above mentioned point to the conclusion that Cummings had more than constructive notice of Thompson's fraudulent intent.

Fourth Point. "Even if certain of the property conveyed was real estate, the plaintiff has not brought himself into privity therewith, and hence cannot maintain this suit."

This court disposed of the contention that a mining claim is not realty in the case of Eadie v. Chambers, 172 Fed. 79. The action was ejectment to recover possession of a half interest in a mining claim in Alaska, and for damages for the detention. It was brought un-

der Section 301 of the Alaska Code of Civil Procedure, which provides that "Any person who has a legal estate in real property and a present right to the possession thereof, may recover such possession, with damages. etc." Judgment for possession in that case was necessarily based upon the doctrine that a mining claim is real estate. The federal supreme court has laid down the same doctrine so often that citations can only weary this court.

The contention that plaintiff has not brought himself into privity with the real property conveyed is well answered by the following extract from the opinion of Sanburn, C. J. in Schofield v. Ute Coal and Coke Co. 92 Fed. 269.

"In the case at bar all the property which the judgment debtor has is real estate in La Plata county. The judgment is a lien upon all this property. The levy of an execution upon it could not make this lien more specific or more efficient, and the conclusion is irresistible that the general lien upon real estate created by entering a judgment or filing a transcript of it in the county where the lands of the debtor are situated in accordance with the statutes which provide therefor, is a sufficient basis for the maintenance of a suit in equity to remove a fraudulent obstruction to the enforcement of that lien." Bump, Fraud. Conv. 535; Black Judgm. Sec. 400.

Counsel for defendants refer feelingly to the "magnificent distances" of Alaska, and the difficulty of traversing them. This case also illustrates the magnificent stretches of time over which a judgment debtor in Alas-

ka can extend his evasion of payment of an adjudicated demand. As a means of discouraging debtors in like cases hereafter plaintiff respectfully suggests that this is an apt occasion for application of this court's rule designed for filibustering appeals.

Rule 30. Sec. 2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded upon the judgment.

Exceptions to Conclusions of Law. Discussion of the points of brief for defendants numbered 5 to 9 inclusive, which points refer to alleged errors of the trial court in its conclusions of law, numbered as assignments of error 9 to 13 inclusive, appears to appellee's counsel to be needless. If it were admitted that the conclusions of law are all subject to the charge that they contain findings of fact, the objection is wholly artificial. Such defects, if any there be, are harmless error. The findings of fact are explicit and the judgment based on them clearly stated. Intermingling of facts with conclusions of law, if found, cannot vitiate a judgment sufficiently fortified by the facts and law of the case.

The remaining assignments of error are formal, and fully covered by the other assignments, and arguments dealing with them.

Counsel for appellee respectfully submit that the

record contains no error suggesting the possibility of prejudice to the defendants.

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